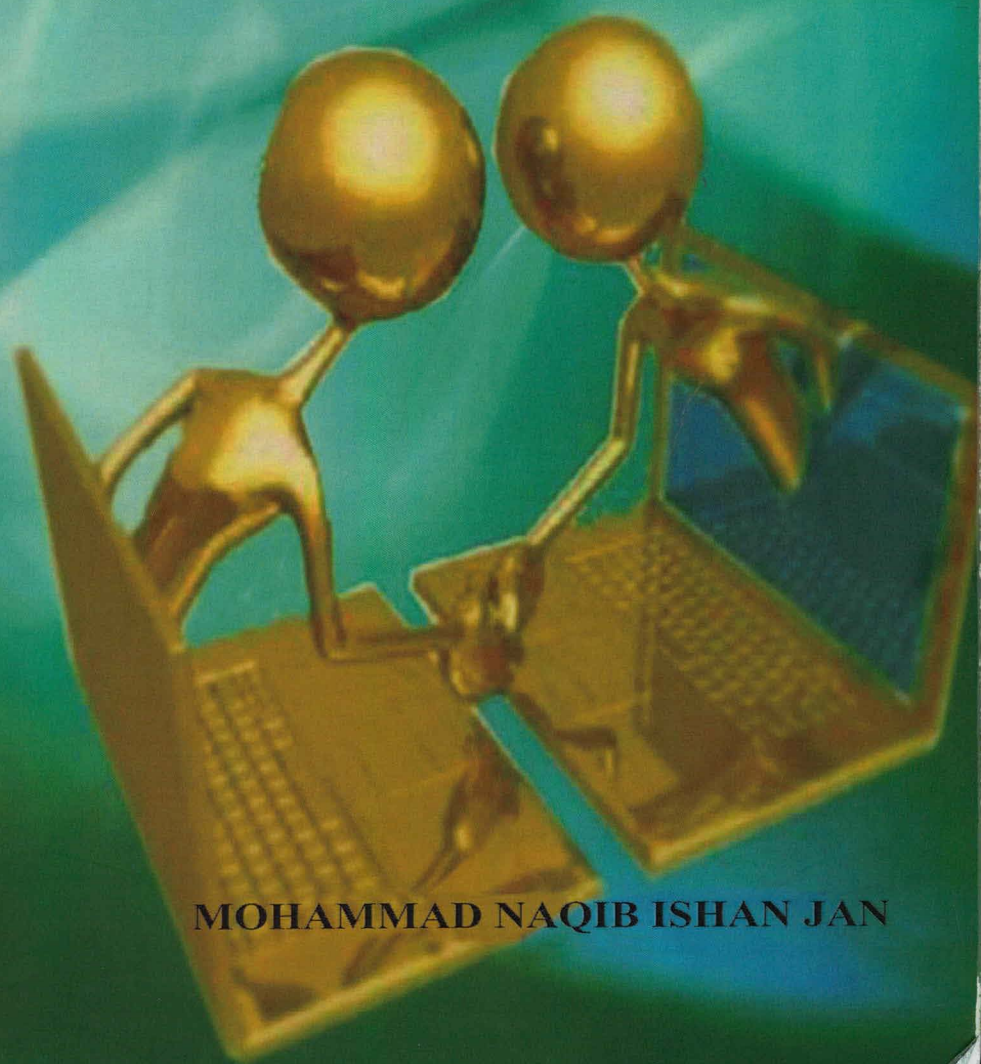


# **LAW AND COMMERCE : THE MALAYSIAN PERSPECTIVE**



**MOHAMMAD NAQIB ISHAN JAN**

# **LAW AND COMMERCE: THE MALAYSIAN PERSPECTIVE**

**MOHAMMAD NAQIB ISHAN JAN**

LLB (HONS) (IIUM), MCL (IIUM),  
Ph.D (IIUM)

ASSOCIATE PROFESSOR,

COORDINATOR OF ALTERNATIVE DISPUTE  
RESOLUTION UNIT,

AHMAD IBRAHIM KULLIYAH OF LAWS (AIKOL)  
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA



**IIUM Press**

Published by:  
IIUM Press  
International Islamic University Malaysia

First Edition, 2011  
©IIUM Press, IIUM

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without any prior written permission of the publisher.

Perpustakaan Negara Malaysia

Cataloguing-in-Publication Data

Mohammad Naqib Ishan Jan

Law and Commerce: The Malaysian Perspective

Include index

ISBN 978-967-0225-43-2

ISBN: 978-967-0225-43-2

Member of Majlis Penerbitan Ilmiah Malaysia – MAPIM  
(Malaysian Scholarly Publishing Council)

Printed by :  
**IIUM PRINTING SDN. BHD.**  
No. 1, Jalan Industri Batu Caves 1/3  
Taman Perindustrian Batu Caves  
Batu Caves Centre Point  
68100 Batu Caves  
Selangor Darul Ehsan

# CONTENTS

<i>Authors' Profile.....</i>	<i>i</i>
<i>Preface.....</i>	<i>v</i>
<i>Contents .....</i>	<i>ix</i>
<i>Table of Cases.....</i>	<i>xxvii</i>
<i>Table of Legislation.....</i>	<i>xlix</i>

## PART I

### The Malaysian Legal System: An Overview

#### Chapter 1

#### Law and Legal System in Malaysia: An Overview

THE NATURE OF LAW.....	2
Definition of Law.....	2
Sources of Law.....	5
Written Law.....	5
Federal Constitution.....	5
State Constitution.....	6
Act, Enactment or Ordinance.....	6
Subsidiary Legislation.....	7
Unwritten law.....	9
Common Law.....	9
Reception of English Common Law in Malaysia.....	9
Customary Law .....	11
Islamic Law.....	13
Islam in Malaysia.....	15
Syariah courts in Malaysia.....	17
LAW MAKING AND LAW ENFORCEMENT MACHINERY....	20
Legislature to make Law.....	22

Judiciary to enforce the Law.....	25
Hierarchy of Courts in Malaysia.....	27
Special Court.....	28
Federal Court.....	28
Court of Appeal.....	29
High Court.....	30
Original Jurisdiction - Criminal Jurisdiction.....	32
Original Jurisdiction - Civil jurisdiction.....	33
Specific Jurisdiction.....	33
Family Division.....	33
Appellate Jurisdiction.....	34
Revisionary Jurisdiction.....	34
Muamalat Division.....	34
New Commercial Court.....	35
Sessions Court.....	36
Magistrates' Court.....	37
Arbitration.....	37

## **PART II**

### **Law of Contract: Fundamental to All Aspects of Commercial Law**

#### **Chapter 2**

#### **The Nature of the Law of Contract**

THE DEFINITION AND TYPES OF CONTRACT .....	49
Definition of Contract.....	49
Types of Contract.....	50
THE GOVERNING LAW.....	51
The Contracts Act 1950.....	51
English Common law.....	53
THE REQUISITS OF A VALI CONTRACT.....	54

#### **Chapter 3**

#### **The Primary Elements of an Enforceable Contract**

PROPOSAL (OFFER).....	57
ACCEPTANCE.....	60
CONSIDERATION.....	63
INTENTION.....	70

## **Chapter 4**

### **Intention to Create Legal Relations**

ISSUES PERTAINING TO INTENTION TO CREATE LEGAL RELATIONS .....	76
Domestic Agreements.....	76
Agreements between Husband and Wife.....	76
Car Pool Agreements may Involve the Necessary Intention.....	78
Arrangements between Parents and Children.....	79
Other Social Arrangements.....	80
Commercial Agreements.....	81
Letters of Comfort.....	82
CONCLUSION.....	84

## **Chapter 5**

### **Parties to Contract**

CAPACITY TO CONTRACT .....	88
Legal Competency.....	88
Effect of Contract Entered by Minor.....	88
Effect of Misrepresentation of Age by a Minor.....	89
Recovery of property Transferred under a Contract Entered by Minor.....	90
Exceptions to the General Rule in Capacity to Contract.....	92
Persons of Sound Mind.....	94
PRIVITY OF CONTRACT .....	95
The Origin and Development of Privity of Contract at Common Law.....	95
The General Rule of Privity of Contract in Malaysia....	96
The Exceptions to the General Rule in Privity of Contract.....	97
CONCLUSION.....	100

## **Chapter 6**

### **Distinction between Void and Voidable Contracts**

VOIDABLE CONTRACT.....	105
------------------------	-----

Meaning of Voidable Contract.....	105
Circumstances Where Contract becomes Voidable....	106
Coercion.....	106
Undue Influence.....	107
Fraud and Fraudulent Misrepresentation.....	109
Burden of Proof for Fraud .....	110
Fraudulent Misrepresentation.....	113
Elements of fraud and misrepresentation.....	114
There must be a Representation of Fact.....	114
A representation of law.....	115
An expression of opinion.....	115
Fraud or misrepresentation under section 340 (2) (a) of the National Land Code.....	119
Exception to section 19 of the Malaysian Contracts Act.....	122
VOID CONTRACT .....	122
Meaning of Void Contract.....	122
Circumstances where Contract becomes Void.....	122
Doctrine of Severance .....	129
Agreements Void If Object or Consideration is Void ..	131
Agreement in Restraint of Marriage Void.....	132
Agreement in Restraint of Trade .....	133
Agreements in Restraint of Legal Proceedings Void ...	133
Agreements' Void for Uncertainty .....	134
Agreements By Way of Wager Void .....	135
CONCLUSION.....	136

## Chapter 7

### Discharge of Contract

DISCHARGE BY CONSENT OR AGREEMENT BETWEEN THE PARTIES.....	141
DISCHARGE BY PERFORMANCE.....	144
Time and Place of Performance .....	145
Effect of Failure to Perform .....	145
DISCHARGE BY BREACH OF CONTRACT.....	147
BREACH DUE TO REPUDIATION OF THE CONTRACT....	150
DISCHARGE BY FRUSTRATION OR IMPOSSIBILITY OF PERFORMANCE.....	150
CONCLUSION.....	153

## Chapter 8

### Remedies for Breach of Contract

TYPES OF REMEDIES.....	155
Damages.....	155
Section 74 of the Contract Act 1950 and	
Remoteness of Damages.....	156
First Limb of Section 74(1) .....	159
Second Limb of Section 74(1) .....	160
Quantum of Damages.....	161
Expectation loss.....	161
Reliance loss.....	162
Proof of Damage.....	163
Duty to Mitigate.....	163
Section 75 of the Contracts Act 1950.....	164
Rescission.....	167
Specific Performance.....	168
Injunction.....	169
Mareva Injunction .....	170
Anton Piller Order .....	170
Quantum Meruit.....	171

## Chapter 9

### Law of Contract in Shariah

THE PILLARS OF A CONTRACT.....	176
Offer ( <i>Ijab</i> ) and Acceptance ( <i>qabul</i> ) <i>sighah</i> .....	177
The Existing of two Properly and Qualified Contracting	
Parties ( <i>Al-'Aqid</i> ).....	178
Subject Matter of Contract ( <i>Mahal al Aqid</i> ).....	179
THERE SHALL BE NO IMPEDIMENTS AFFECTING THE	
VALIDITY OF THE CONSENT.....	181
The Elements of Gharar.....	183
CONCLUSION .....	183



## **PART III**

### **E-Commerce**

#### **Chapter 10**

#### **E-Commerce and the Practice in Malaysia: An Overview**

DEFINITION OF E-COMMERCE.....	186
E-COMMERCE AND E-CONTRACTS.....	186
THE REGULATORY FRAMEWORKS.....	187
By the United Nations.....	187
E-commerce Regulations.....	188
The Malaysian laws.....	189
OTHER RELEVANT STATUTES .....	191
TYPES OF E-COMMERCE.....	191
Business to Business (B2B).....	191
Business to Consumer (B2C).....	191
Consumer to Business (C2B).....	192
Business to Employee (B2E).....	192
Consumer to Consumer (C2C).....	192
ADVANTAGES AND DISADVANTAGES .....	193
LEGAL ISSUES IN E-COMMERCE .....	194
Breach of Online Contract .....	195
E-Commerce and Privacy Issues .....	196
E-Commerce and Consumer Protection.....	199
E-Commerce and Web Advertisement .....	200
E-COMMERCE AND ADMISSIBILITY OF ELECTRONIC	
RECORDS IN ELECTRONIC CONTRACTS.....	202
COMMERCE AND OTHER RELATED MATTERS.....	203
Electronic Data Interchange.....	203
Taxation on internet services.....	204
THE CHALLENGES IN E-COMMERCE.....	205
THE FUTURE OF E-COMMERCE.....	206
Virtual Dressing Rooms.....	207
Improved Supply Chain Process.....	207
Sharing of Product Lists and More Choices.....	208
Easier Transactions and Better Delivery Options.....	208
Secured Transactions.....	208

## **Chapter 11**

### **The Law of Electronic Contract in Malaysia: Issues and Challenges**

THE MEANING AND SCOPE OF ELECTRONIC CONTRACT.....	217
THE FUNDAMENTAL PRINCIPLES IN E-CONTRACT LAW..	218
LEGAL LANDSCAPE OF E-COMMERCE IN MALAYSIA.....	222
Digital Signature Act 1997 .....	223
Computer Crimes Act 1997.....	223
Communications and Multimedia Act 1998 .....	224
Payment systems Act 2003 .....	225
Electronic Commerce Act 2006 .....	225
Minimum Guidelines on the Provision of the Internet	
Banking Services by Licensed Institution .....	226
Other Laws Applicable for Oline Environment .....	226
E-CONTRACT UNDER THE ELECTRONIC COMMERCE ACT	
2006: THE BASIC FEATURES.....	228
Functional Equivalence and the Legal Recognition ....	230
Legal Recognition of Electronic Message .....	231
The Requirement of Writing .....	231
The Requirement of Signature .....	232
The Requirement of Seal, Witness and Originality ...	233
The Formation of Electronic Contract .....	234
ELECTRONIC CONTRACT AND THE CHALLENGE OF DATA	
PRIVACY.....	235
Personal Data Protection Act 2010 .....	236
The Seven Data Protection Principles .....	237
ELECTRONIC CONTRACT AND THE CHALLENGE OF	
SYSTEM SECURITY.....	241
CONCLUSION.....	244

## **PART IV**

### **Sale of Goods: The General Principles**

## **Chapter 12**

### **Sale of Goods Law: A Prologue**

BACKGROUND OF THE SOGA 1957 (MALAYSIA).....	251
---	-----

THE APPLICABLE LAW IN SALE OF GOODS LAW IN MALAYSIA.....	255
Section 14 of SOGA 1979 UK: Satisfactory Quality....	258
SCOPE OF THE SALE OF GOODS ACT 1957 .....	259
DEFINITION OF GOODS UNDER THE SOGA .....	261
CLASSIFICATION OF GOODS.....	262
FORMATION OF THE SALE CONTRACT.....	264
DISTINCTION BETWEEN SALE AND AGREEMENT TO SEL.....	265
NATURE OF THE SALE OF GOODS CONTRACT.....	269
CAPACITY TO MAKE A SALE OF GOODS CONTRACT.....	270
FORMALITY AS AN ELEMENT OF A SALE OF GOODS CONTRACT.....	272
PRINCIPLE FOR DETERMINATION OF PRICE OF GOODS.....	273
SALE OF GOODS LAW: AN ISLAMIC PERSPECTIVE.....	275
CONCLUSION.....	279

### **Chapter 13**

#### **Implied Terms under the Sale of Goods Act 1957**

DEFINITION OF THE SALE OF GOODS CONTRACT .....	284
A Contract of Sale.....	284
An Agreement to Sell.....	284
Price.....	285
Goods.....	285
Implied Terms.....	286
Right to sell.....	286
IMPLIED WARRANTY AS TO QUIET POSSESSION.....	289
IMPLIED WARRANTY THAT THE GOODS ARE FREE FROM ENCUMBRANCE.....	290
IMPLIED CONDITION THAT GOODS CORRESPOND WITH DESCRIPTION.....	290
THE FORM OF THE DESCRIPTION.....	290
EXTENT OF THE DESCRIPTION.....	291
SALE BY SAMPLE AND DESCRIPTION.....	293
THE RELATIONSHIP OF DESCRIPTION AND QUALITY..	294
CAVEAT EMPTOR.....	295
Implied condition as to quality under Section 16(i)(a).....	296
Buyer's reliance on the sellers' skill and judgment....	298

DISCLOSURE OF PURPOSE.....	301
IMPLIED CONDITION AS TO MERCHANTABLE QUALITY.....	302
Meaning of merchantable quality.....	303
SALE BY SAMPLE.....	307
EXCLUSION OF IMPLIED TERMS.....	310

## Chapter 14

### Transfer of Title

THE GENERAL RULE.....	314
EXCEPTIONS TO THE <i>NEMO DAT</i> RULE.....	317
Estoppel.....	317
Sale by Mercantile Agent.....	318
Sale by One of Joint Owners.....	320
Sale under Voidable Title.....	321
Disposition by Seller in Possession after Sale.....	322
Dispossession by Buyer in Possession after Sale.....	323

## Chapter 15

### Rights and Remedies of the Buyer and the Seller

RIGHTS AND DUTIES OF THE SELLER.....	330
RIGHTS AND DUTIES OF THE BUYER.....	332
REMEDIES.....	334
DAMAGES FOR NON-DELIVERY.....	335
Damages.....	335
Compensation for Breach of Contract where Penalty is Stipulated For .....	336
Specific Performance.....	337
Restitution.....	337
Expectation Loss.....	338
Reliance Loss.....	339
Remedies for Seller.....	339
Right to Forfeit Deposit.....	340
A Lien.....	341
Stoppage in Transit.....	342
Resale by Seller.....	342
CONCLUSION.....	342

## **Chapter 16**

### **Disputes and Issues Relating to Sale and Purchase of Land in Malaysia**

THE NATURE OF LAND OWNERSHIP AND GOVERNING LAWS.....	346
TYPE OF LAND OR PARCEL.....	348
THE SALE AND PURCHASE AGREEMENT.....	348
ISSUES RELATING TO SALE AND PURCHASE OF LAND...	350
SPA Conditional upon Compliance with Restriction in Interest.....	350
Other Conditions Attached to the SPA.....	351
Purchase Subject to an Existing Tenancy.....	352
Purchase of Property Subject to a Charge Action.....	353
Effect of Pending Land Acquisition.....	354
DISPUTES RELATING TO SALE AND PURCHASE OF LAND.....	356
Late Delivery of Vacant Possession.....	356
Abandoned Housing Projects by Developers.....	357
Poor Workmanship or Quality.....	358
CONCLUSION.....	359

## **PART V**

### **Hire Purchase**

## **Chapter 17**

### **A Review on the Application of Malaysian Hire Purchase Act 1967 and the Recent Amendment 2010**

MEANING OF "HIRE PURCHASE" UNDER HPA.....	368
MEANING OF "GOODS" UNDER THE HPA.....	370
Formation of the Hire Purchase Agreement .....	371
Pre-Contractual Obligations.....	371
Construction of a Hire-Purchase Agreement.....	372
Post Contractual Obligations.....	372
RIGHTS AND PROTECTIONS OF HIRERS.....	373
STATUTORY RIGHTS OF THE HIRER.....	376
REPOSSESSION OF GOODS BY THE OWNER AND RIGHTS OF THE HIRER.....	377
Procedures Prior to Repossession.....	379

Procedures during Repossession.....	380
Procedures after Repossession.....	381
INSURANCE.....	382
CONCLUSION.....	383

## Chapter 18

### Islamic Hire-Purchase (Al-IjarahThumma al-Bay') (AITAB)

DEFINITION OF IJARAH.....	387
IJARAH VS KIRA.....	388
LEGALITY.....	388
The Qur'an .....	388
The Sunnah.....	389
Consensus of Scholars.....	390
DEFINITION OF ISLAMIC HIRE-PURCHASE (AITAB).....	390
AITAB VS INSTALLMENT SALE.....	391
AITAB VS OPERATING LEASE.....	391
PRACTICAL STEPS OF AITAB.....	392
JURISTIC CONSTRUCTION OF AITAB (AL-TAKYEEF AL-FIQHI).....	392
LEGAL RULING FOR AITAB.....	393
AREA OF APPLICATION.....	397

## PART VI

### Law of Agency

## Chapter 19

### Agency Law

MEANING OF AGENT.....	400
CREATION OF AGENCY: AUTHORITY.....	400
Express and Implied Appointment.....	401
Doctrine of Estoppels.....	402
Ratification.....	403
Necessity.....	404
APPOINTMENT BY COHABITATION.....	405
OBLIGATIONS OF AGENT TO PRINCIPAL.....	405
RIGHTS OF AGENT.....	409

AGENT AUTHORITY.....	410
TERMINATION OF AGENCY.....	412

## Chapter 20

### Agency in Islamic Law

DEFINITION OF AGENCY (WAKALAH).....	419
DISTINGUISHING AGENCY FROM OTHER RELATIONSHIPS.....	420
Agency and Deputation ( <i>niyyabah</i> ).....	420
Agency and Guardianship ( <i>wilayah</i> ).....	420
Agency and "Will" ( <i>wasiyyah</i> ).....	420
Legality of Agency.....	421
Qura'n.....	421
Hadith.....	422
Consensus.....	422
NATURE OF AGENCY CONTRACT.....	423
PILLARS OF AGENCY CONTRACT.....	424
CONDITIONS FOR AGENCY VALIDITY.....	424
Conditions for Contract Language.....	425
Conditions for Principal.....	426
Conditions of Agent.....	426
Conditions for Object of the contract.....	426
Agency in Transactions and Financial Rights.....	427
DELEANINGS WHICH DO NOT ACCEPT LEGAL REPRESENTATION.....	429
Agency in Testimony ( <i>al-shahadah</i> ).....	429
Agency in Acts of Worship.....	429
Agency in <i>hudud</i> and other Punishments.....	430
Agency in establishing <i>hudud</i> crimes.....	430
Agency in Executing <i>Hudud</i> Punishments.....	430
Agency in Executing Retaliatory Punishment.....	431
TYPES OF AGENCY .....	431
Restricted Agency ( <i>wakalah muqayyadah</i> ).....	431
Unrestricted Agency ( <i>wakalah mutkaqah</i> ).....	431
Obligations of agent to principal.....	432
Obligations of principal to agent.....	432
Legal effects of contracts performed by agents.....	433
TERMINATION OF AGENCY CONTRACT.....	433

## **PART VII**

### **Consumer Protection**

#### **Chapter 21**

#### **The Nature of the Law on Consumer Protection**

AN OVERVIEW OF THE CONSUMER PROTECTION ACT 1999.....	438
NEW REGULATIONS ON UNFAIR CONTRACT TERMS.....	440
LIABILITY FOR DEFECTIVE PRODUCTS.....	444
MANUFACTURER'S LIABILITY FOR BREACH OF IMPLIED GUARANTEES.....	445
MANUFACTURER'S LIABILITY FOR BREACH OF EXPRESS GUARANTEES.....	447
MANUFACTURER'S LIABILITY UNDER PART X.....	449
THE TRIBUNAL FOR CONSUMER CLAIMS (TCC).....	454
CONCLUSION.....	456

## **PART VIII**

### **Negotiable Instruments and Franchise Law**

#### **Chapter 22**

#### **Negotiable Instruments**

DEFINITION OF NEGOTIABLE INSTRUMENTS.....	464
TYPES OF NEGOTIABLE INSTRUMENT.....	464
Statute: Bills of Exchange 1949.....	465
Promissory Notes.....	465
Cheque.....	465
Mercantile Custom.....	465
Bankers' Draft.....	465
Bank Notes.....	466
Travellers' Cheques.....	466
Treasury Bills.....	466
Share Warrants.....	466
Dividend Warrants.....	466
Debentures.....	467
DEFINITION AND CHARACTERISTICS OF BILLS OF EXCHANGE.....	467
FUNCTIONS OF BILLS OF EXCHANGE.....	470



THE ELEMENTS OF BILLS OF EXCHANGE.....	471
Consideration.....	471
Capacity to Contract.....	471
Negotiation of Bills.....	471
Acceptance.....	472
Endorsement .....	473
Delivery.....	474
Liability of the Parties.....	475
Holder.....	476
Holder in Due Course.....	476
Holder for Value.....	477
ISSUES OF BILLS OF EXCHANGE.....	477
Forged Signatures.....	477
Inchoate Bills.....	477
Presentment for Payment.....	478
Procedure of Dishonour.....	479
Noting and Protest.....	479
CHEQUES.....	480
Definition .....	480
Characteristics .....	480
Legal Effect on Cheques.....	480
Crossing of Cheques.....	482
Alteration on a cheque.....	482
PROTECTION OF THE PAYING BANKER.....	483
PROTECTION OF THE COLLECTING BANKER.....	484
TERMINATION OF A BANKER'S AUTHORITY TO PAY....	484
ANTI-MONEY LAUNDERING ACT 2001.....	485
CASE LAWS ON NEGOTIABLE INSTRUMENTS.....	486
SHARIAH PERSPECTIVES ON NEGOTIABLE	
INSTRUMENTS.....	497
Definition of <i>Sukuk</i> .....	497
Basic Structure of <i>Sukuk</i> .....	499
Purpose and Benefits of <i>Sukuk</i> .....	499
Comparison with Bonds.....	501
Comparison between <i>Sukuk</i> and Bond.....	502

## Chapter 23

### Franchise Law in Malaysia

FRANCHISE IN MALAYSIA.....	504
Definition.....	505

The Law.....	506
FRANCHISE AGREEMENT.....	507
Duration.....	510
Fees and Promotion Fund.....	512
FRANCHISE BUSINESS.....	512
Conduct of the Parties.....	513
Offences.....	513
CONCLUSION.....	515

## PART IX Other Related Topics

### Chapter 24 Civil Court Jurisdiction over Islamic Banking Cases – Muamalat Division of the High Court

LEGISLATING POWERS OVER ISLAMIC BANKING LAWS.....	520
ARTICLE 3(1) OF THE FEDERAL CONSTITUTION AND ITS IMPLICATIONS ON ISLAMIC BANKING INDUSTRY.....	521
CIVIL COURT JURISDICTION OVER ISLAMIC BANKING CASES.....	523
MUAMALAT DIVISION OF THE HIGH COURT.....	524
MUAMALAT DIVISION OF THE HIGH COURT VIS-A-VIS SHARI'AH ADVISORY COUNCIL OF BANK NEGARA MALAYSIA.....	532
CONCLUSION.....	534

### Chapter 25 The Nature, Concept and Epistemological Development of the Law of Bailment: A Prolegomenon

THE NATURE OF THE LAW OF BAILMENT.....	538
SOURCES OF THE LAW OF BAILMENT IN MALAYSIA.....	540
ELEMENTS OF BAILMENT.....	541
Subject Matter .....	542
Delivery .....	542
Purpose .....	543
Contract .....	543

PROVISION ON RETURNING THE GOODS AFTER THE PURPOSE IS SERVED.....	543
CLASSIFICATION OF BAILMENT.....	544
DUTIES OF THE BAILEE.....	546
RIGHTS OF THE BAILEE.....	548
Bailee's Right of Particular Lien.....	548
Bailee's Right of General Lien.....	549
Right Regarding Delivery of Goods to one of Several Joint Bailors.....	550
Right Regarding Delivery of Goods to Bailor without Title.....	550
Right to Claim Damages for Non-Discloser of the Faults in the Goods Bailed.....	551
Right to Claim Payment for Necessary Expenses ....	552
Right to be indemnified by the Bailor.....	552
Right to Claim Compensation for Safe Custody.....	553
LIABILITY OF THE BAILEE.....	553
Liability under Bailment Contract.....	553
Liability of Bailee for Tort.....	555
Liability of Negligence.....	556
BURDEN OF PROOF IN THE LAW OF BAILMENT .....	557
RESPONSIBILITY OF THE BAILEE: AN ISLAMIC SPIRITUAL PERSPECTIVE.....	560
CONCLUSION.....	561

## Chapter 26

### The Tort of Negligence

THE DUTY OF CARE.....	566
The Scope of Duty of Care.....	567
Reasonable Foreseeability .....	567
Proximity .....	568
Public interest.....	568
NEGLIGENT STATEMENTS.....	568
The Need for a Special Relationship – Knowledge of Victim.....	571
From Knowledge to Foresight.....	572
From Foresight Back To Knowledge.....	575
Avoiding and Excluding Liability.....	579
Professional negligence insurance.....	579

The Present Position Regarding Duty of Care- A Summary.....	580
THE DOCTRINE OF <i>RES IPSA LOQUITUR</i> .....	581

## Chapter 27

### Islamic Commercial Law

DEFINITION OF COMMERCIAL LAW.....	586
THE EVOLUTION OF ISLAMIC COMMERCIAL LAW.....	587
THE ISLAMIC REFORM.....	588
THE BASIC CONCEPT AND PRINCIPLES OF COMMERCIAL LAW.....	590
Justice and Goodness.....	590
Transparency in Commercial Dealings.....	592
Prohibition of Gharar.....	592
Circulation of Wealth and Prohibit Hoarding and Monopoly.....	594
CONCLUSSION.....	594
<b>INDEX</b> .....	597

## CHAPTER 4

# INTENTION TO CREATE LEGAL RELATIONS

*by*

MOHD. AKRAM BIN SHAIR MOHAMED\*

A contract is an agreement enforceable by law.<sup>1</sup> The basis of all contracts is an agreement, although not all agreements will inevitably result in contracts. The law does not recognise the existence of a contract merely because of the presence of mutual promises. Agreements are made daily in domestic and social life where the parties do not intend that their arrangements should be attended by legal consequences, should the engagement not be honoured. So to offer a colleague a meal of *nasi kandar* is not to invite litigation. As Lord Stowell vividly said, contracts must not be the sports of an idle hour, mere matters of pleasantries and badinage never intended by the parties to have serious effects whatever.<sup>2</sup>

It has now become a requirement that in addition to the essential elements of offer / proposal and acceptance and consideration, a third contractual element is required, i.e. the intention of the parties to create legal relations. Although this view commonly held in England<sup>3</sup> has been challenged by no lesser person than the distinguished American jurist, Professor Williston<sup>4</sup> who opined that the separate element of intention is foreign to the common law, imported from the Continent by academic influences in the nineteenth century and useful only in systems